No. 242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TABLE OF CONTENTS.

Table of Cases.

CONSTITUTIONAL PROVISIONS AND STATUTES.

OTHER AUTHORITIES.

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Respondents.

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Glidden Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered herein on March 28, 1961.

Opinions Below.

The opinion and judgment of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 185 F. Supp. 441 and at page A-1, appendix A. The opinion of Honorable J. Warren Madden of the United States Court of Claims (sitting by designation) concurred in by Honorable Sterry R. Waterman, in

the Court of Appeals for the Second Circuit, reversing the judgment of the District Court and remanding the case for further proceedings not inconsistent therewith, and the dissenting opinion of Honorable J. Edward Lumbard, Chief Judge, are reported at 288 F. 2d 99, 105 and pages A-18 and A-29, appendix A.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on March 28, 1961 (page A-31, appendix A). A timely petition for rehearing, filed on April 12, 1961, was denied on April 24, 1961 (Vol. 2, page 144a of certified record).

The statutory provision conferring jurisdiction on this court is found at 62 Stat. 928; Title 28 U. S. C. §1254(1).

Questions Presented.

(a) Are seniority rights in a given bargaining unit, arising under a collective bargaining agreement applicable to a specific plant which has been closed, transferable to another plant in the absence of language in the agreement expressing an intent that they should be so transferable?

(b) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after the employment has been duly terminated in good faith?

(c) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after that agreement has been duly terminated in good faith?

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Article I, Sections 1 and 8; Article III, are set forth at pages B-1 to B-4 of appendix B to this petition.

49 Stat. 452; 61 Stat. 140; 65 Stat. 601; 73 Stat. 525, 542, 545; Title 29 U. S. C. §158 (a), (1), (5); (b), (1), (3), are set forth at page B-5 of appendix B to this petition.

61 Stat. 140; Title 29 U. S. C. §157 is set forth at page B-4 of appendix B to this petition.

61 Stat. 156; Title 29 U. S. C. §185 (a) is set forth at page B-5 of appendix B to this petition.

67 Stat. 226, Title 28 U. S. C. §171 is set forth at page B-4 of appendix B to this petition.

Statement Under Rule 33(2)(b) of the Rules of the Supreme Court of the United States.

Since the proceeding draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U. S. C. §171, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that Title 28 U. S. C. §2403 may be applicable.

No court of the United States as defined by Title 28 U. S. C. §451 has, pursuant to Title 28 U. S. C. §2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

Statement of Case.

Respondents commenced this action in the Supreme Court of the State of New York. The action was removed to the United States District Court for the Southern Dis-

trict of New York which had jurisdiction since the requisite diversity of citizenship among the parties existed and the amount in controversy exceeded $10,000. Each respondent claimed damages for an alleged breach of the collective bargaining agreement between petitioner and the collective bargaining agent of respondents and numerous other former employees of petitioner who are plaintiffs in an action pending in the Supreme Court of New York, New York County. Respondents alleged that petitioner deprived them of property rights accruing to them under the agreement such as benefits under a Welfare Plan, a Pension Plan and Group Insurance Plan (not provided for in the agreement) to which they might have been entitled *if they had been continued in the employment of petitioner after the termination of their employment, and after the termination of the collective bargaining agreement* in accordance with its terms, and *after the closing of the plant* where respondents were formerly employed and *to which the agreement specifically applied* (Vol. I, page 37a *et seq.* of certified record).

The collective bargaining agreement here (Vol. I, page 56a of certified record) covered the period from December 1, 1955 to November 30, 1957. Like earlier agreements, it would be automatically renewed from year to year unless terminated by either party by sixty days notice which in fact was given by petitioner (Vol. I, page 80a of certified record). It provided with respect to seniority that employees with specified years of continuous employment were entitled to be recalled from lay off for specific periods of time but contained no provision for recall after termination of employment or the agreement (Vol. I, page 68a and 69a of certified record).

Shortly prior to November 30, 1957, the date of the closing of petitioner's plant at Elmhurst, Long Island, New

York, where these former employees were employed, petitioner opened a plant in Bethlehem, Pennsylvania which utilized new and improved machinery, better production line layouts and modern production line methods in the manufacture of many of the same products formerly manufactured at Elmhurst (Vol. I, page 81a of certified record). On that date and at times immediately prior thereto, respondents' employment by petitioner was terminated by petitioner because of the anticipated closing and the actual closing of its Elmhurst plant. Respondents had been told of the closing in May 1957, and their collective bargaining agent was told of it in September 1957 when it was duly notified that the collective bargaining agreement would terminate on its date of expiration, November 30, 1957 (Vol. I, page 80a of certified record). The actual closing of the plant occurred on the same date as the date of the termination of the collective bargaining agreement in accordance with its terms.

No claim has been made by respondents, nor by their collective bargaining agent, of any improper termination of employment. Respondents merely claim that they should have been continued in employment with petitioner at its plant in Bethlehem, Pennsylvania, with seniority rights based upon length of service at Elmhurst and that the denial thereof constituted a breach of the agreement.[1]

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[1] For the petitioner to have agreed to such seniority at Bethlehem, might well have constituted an unfair labor practice. Title 29 U. S. C. §157, 158(a), (1), (5), and 158(b), (1), (3), (Appendix B, pages B-4 and B-5). Employees at Bethlehem might have chosen, as in fact they did, a different collective bargaining agent which had the right to bargain with respect to working conditions including seniority. A seniority arrangement agreed upon in advance with the former Elmhurst employees could not be properly or legally imposed upon the Bethlehem unit where the collective bargaining agent of petitioner's former employees "* * * would not have a leg to stand on, * * *" as conceded by their counsel at page 53 of transcript of trial.

The trial was held before Honorable Edmund L. Palmieri on a statement of facts given by petitioner in lieu of the taking of its deposition which was the only evidence at the trial except for the text of three earlier collective bargaining agreements introduced by respondents. A jury trial was waived except with respect to the question of damages if any, in the event liability on the part of petitioner was established. Judge Palmieri ordered judgment for petitioner (appendix A, page A-17). He held that it was not necessary to decide whether the seniority rights survived the termination of employment of respondents or the proper termination of the collective bargaining agreement. These seniority rights, he said, arose under a collective bargaining agreement expressly limited to employment at petitioner's Elmhurst, Long Island plant. "In order to recover," the court's opinion states, "plaintiffs must also show that the governing seniority system gave them the right to 'follow their work' to the new plant." He noted that the Elmhurst plant was closed in good faith as petitioner had a right to do which fact was not suggested as a breach of the agreement or a violation of law. See, *Matter of Arbitration between General Warehousemen's Union Local 852 etc. and the Glidden Company,* 10 Misc. 2d (NY) 700; 172 N. Y. S. 2d 678 (1958), where Mr. Justice Kusnetz in staying arbitration between petitioner and respondents' collective bargaining agent ruled that petitioner had complied with every term of its agreement relating to the welfare, pension and group insurance plans and had not violated any specific term of the agreement, although the identical claims made here were made there.[2]

Judge Palmieri pointed out that there was nothing in the record to warrant the conclusion urged by respondents

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[2] The Court of Appeals rejected petitioner's defense of *res judicata.* Appendix A at pages A-21 to A-23.

as to the unlimited geographic scope of their seniority rights and referred to wide variations existing in seniority systems used in industry, and with respect to the unit to which seniority rights applied noted that an entire multi-plant company or district may be made subject to the same system, or that the system may be limited to a particular plant, department, or occupation. He referred to the numerous types of units which had been agreed upon in collective bargaining and concluded:

> "* * * it would be unreasonable to expect a court to imply a general understanding between the parties as to the extent of the seniority unit when no evidence has been offered as to negotiations on the subject or an established course of practice on the part of the employer.
>
> * * * * *
>
> In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant" (Appendix A, pp. A-15, A-16).

Judge Madden in the Court of Appeals held that under the collective bargaining agreement, respondents had earned vested seniority rights which endured and were enforceable after the termination in good faith of the agreement under which provision was made therefor and after the termination in good faith of the employment of respondents to which such seniority rights attached. He further held that such rights were applicable to petitioner's plant in Bethlehem, Pa. where respondents were "entitled to be employed * * * with the seniority and re-employments rights which

they had acquired at the Elmhurst plant." Chief Judge Lumbard dissented in an opinion stating that Judge Palmieri's determination was thorough and correct and that the agreement did not provide for the retention of seniority rights beyond the termination of the collective bargaining agreement. He stated (appendix A, page A-30):

> "The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly *done in good faith* [emphasis added] and were not wholly unforeseeable. As Judge Palmieri pointed out it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. * * * It is hardly 'so irrational and destructive' for a court to leave the parties as they are if they had never seen fit to provide otherwise."

Respondents and other former employees of petitioner were not laid off, as Judge Madden erroneously assumed in order to apply the seniority provisions of the terminated agreement. Their employment in fact was permanently terminated (Vol. I, pages 89a and 90a of certified record).

Layoff refers to "a temporary or indefinite separation of an employee from his work, as distinguished from a permanent termination of employment, * * *." Labor Law Guide, ¶2220, Commerce Clearing House Inc.; *A. C. F. Industries, Inc.* v. *Industrial Commission*, 320 S. W. 2d 484, 491 (Sup. Ct. of Missouri—en banc—1959).

"Seniority may be defined as a right or preference in employment which is earned by and based upon length of service. That right of preference is not absolute, however, and may be limited by many factors which determine the value of seniority to a particular worker. An employee

may exercise his seniority rights only while working for the same employer, within a particular department or occupational group, or within an agreed seniority district which may vary in size from a shop or office in one plant to several or all the plants of a given company, *depending upon the agreement''*. (emphasis added.) Mitchem, Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mt. L. Rev. page 156, at page 157 (1949).

Reasons for Allowance of the Writ.

The Court of Appeals has held in effect that an employee covered by a collective bargaining agreement providing for seniority rights, has a right to be recalled to employment *wherever* the employer carries on a similar manufacturing process (despite the application of the agreement to a specific plant), after his employment has terminated, and after the termination of the agreement under which provision is made therefor, in accordance with its terms.

This petition for a writ of certiorari should be granted because:

1. Rights and obligations under collective bargaining agreements involve federal substantive law and are fashioned from the policy of the national labor laws.

2. The decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals for the Fifth, Sixth and Seventh Circuits, each of which has held that in the absence of express language to the contrary, seniority rights endure only during the life of the collective bargaining agreement providing therefor, or only during the period of the existence of the relationship of employer and employee.

3. The decision of the Court of Appeals has determined questions of widespread importance involving

federal substantive law which have not been, but should be, settled by this court.

4. Participation by a Court of Claims judge vitiates the judgment of the Court of Appeals.

Argument in Support of Reasons.

1.

The rights and obligations in collective bargaining agreements involve federal substantive law.

In *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957), in a suit by a union to compel arbitration of a grievance under §301 of the LMRA, 61 Stat. 156; Title 29 U. S. C. §185, it was stated by Mr. Justice Douglas at page 451 that that section

> "• • • authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements • • •. Perhaps the leading decision representing that point of view is one rendered by Judge Wyzanski in *Textile Workers Union* v. *American Thread* (D. C. Mass.) 113 F. Supp. 137. That is our construction of §301(a). [§185 of 29 U. S. C.] • • •."

At page 455 he stated:

> "§302 of the House Bill, the substantial equivalent of the present §301 was being described by Mr. Hartley, the sponsor of the bill in the House:
>
> "Mr. Barden. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as the history of the legislation.
>
> "It is my understanding that §302, the section dealing with equal responsibility under collective bargaining contracts, in strike actions and proceed-

> ings in district courts, contemplate not only the ordinary law suits for damages, but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act, in order to secure declarations from the Court of legal rights under the contract.
>
> "Mr. Hartley. The interpretation the gentleman has just given of that section is absolutely correct. 93 Cong. Rec. 3656, 3657."

and at page 456

> "The question then is, what is the substantive law to be applied in suits under §301(a)? We conclude that the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws."[3]

While this court, in *Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437 (1954) held that federal courts do not have jurisdiction under §301 where the union sued to recover payments alleged to be owing to the individual employees, it seems that federal substantive law should apply to such suits by individual employees. There is no question that an employee wrongfully deprived of rights accruing to him individually, during the existence of the term of a collective bargaining agreement, may enforce them.[4]

Seniority rights do not merely involve an individual employee's right, but as stated by Judge Madden, in the

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[3] Numerous decisions are listed by Mr. Justice Douglas in footnote 2 to his opinion to the effect that §301(a) is more than jurisdictional and creates substantive rights authorizing federal courts to fashion a body of federal labor law.

[4] Rights of Individual Employee to Enforce Collective Bargaining Agreement against Employer, 18 ALR 2d 353, 366 (1950).

majority opinion here (appendix A, page A-25), a collective bargaining agent may bargain away such rights. A collective bargaining agent may rearrange the order of seniority or abolish the entire order. *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 339 (1953). A collective bargaining agent has interests "* * * which embrace the system of seniority rights." *Aeronautical Industrial Dist. Lodge 727* v. *Campbell,* 537 U. S. 521, 527 (1949). A collective bargaining agent therefore has the right to maintain an action with respect to seniority rights under §301 of the LMRA (61 Stat. 156; Title 29 U. S. C. §185) in the federal courts where Congress intended the courts to fashion a federal law from the policy of the national labor laws.

Collective bargaining agents having such extensive rights and interests in seniority provisions, could therefore enforce such rights in the federal courts under the federal policy referred to without coming within the prohibition laid down in *Westinghouse.*

In order to fashion a comprehensive pattern of rights, obligations and remedies under collective bargaining agreements, federal law should be looked to for the determination of the rights and obligations under collective bargaining agreements relating to seniority, even when individual employees seek to enforce them. *Ingraham Co.* v. *Local 260 International Union of Electrical Workers, etc.,* 171 F. Supp. 103 (D. C. Conn. 1959); *New Bedford Defense Products Division, etc.* v. *Local 1113 of the International Union, etc.,* 160 F. Supp. 103 (D. C. Mass. 1958); aff'd 258 F. 2d 522 (C. A. 1st Cir., 1958).

In *Ingraham* Judge Anderson stated:

> "If in dealing with cases of this kind, it were to be held that state and federal jurisdiction overlapped and that application could be made to either tribunal to apply its own law, an unnecessary jumble would

> result. Moreover, a controversy might well be determined by the relative fleetness of foot of the party running to the county courthouse for the application of state law as against the alacrity of the other party seeking to invoke federal law in the federal court."

As emphasized by Professor Archibald Cox in Federalism in the Law of Labor Relations, 67 Har. L. Rev. page 1297 (1954), at page 1339:

> "It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding in state tribunals."[5]

In this case Chief Judge Lumbard concluded:

> "* * * the contract should be construed in light of federal substantive law * * *." (Appendix A, page A-29)

The survival of seniority rights and obligations *after the termination of employment* or *after the termination of the collective bargaining agreement* surely should be determined by the same law regardless of whether their enforcement is sought by individuals under diversity jurisdiction or by the collective bargaining agent under §301, and regardless of where their enforcement is sought.

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[5] *Fay* v. *Amer. Cystoscope Makers,* 98 F. Supp. 278 (D. C. S.D.N.Y., 1951); *Swift & Co.* v. *United Packing House Workers,* 177 F. Supp. 511 (D. C. Colo., 1959); Notes on Recent Cases, Harvard L. Rev. Vol. 71, pp. 1169, 1170, 1171, 1172 (1958).

2.

The decision of the Court of Appeals is in conflict with decisions of the United States Courts of Appeals in the Fifth, Sixth and Seventh Circuits, each of which has held that in the absence of express language to the contrary, seniority rights endure only during the life of the collective bargaining agreement by virtue of which they exist, or only during the period of the existence of the relationship of employer and employee.

In *Local Lodge 2040 International Association of Machinists* v. *Servel,* 268 F. 2d 692 (C. A., 7th Cir., 1959), cert. den. 361 U. S. 884, Judge Hastings concluded at page 698:

> "Contrary to appellants' contention, we find nothing in the agreement providing for a *permanent* layoff status to these employees or giving vested rights to seniority for two years following their layoff. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence * * *."[3]

In *System Federation No. 59 of Ry. Employees* v. *La. & A. Ry. Co.,* 119 F. 2d 509 (C. A., 5th Cir., 1941) Judge Hutcheson stated with reference to seniority rights in a collective bargaining agreement, at page 515:

> "The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term."

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[3] "From the very nature of seniority (which has been defined as a *right* or preference in employment) it is obvious that when the employment relation has definitely ceased to exist as a result of either a discharge or voluntary quit, all seniority rights are terminated." Mitchem, Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mt. L. Rev. page 156, at page 181 (1949).

In *Elder* v. *N. Y. Central R. R. Co.*, 152 F. 2d 361 (C. A., 6th Cir., 1945), Judge Martin stated

> "• • • the authorities are uniform to the effect that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions."

Elder held that seniority rights may be changed or abolished by subsequent agreement made by a collective bargaining agent representing employees and the employer.

Elder has been followed in numerous cases holding that neither the collective bargaining agent nor the employer is liable to an employee for so altering or eliminating his seniority status.[7]

Whatever variations in facts may exist in these cases from the facts in the instant case, the rationale in each case is identical.

As stated by Chief Judge Lumbard in his dissent (appendix A, pages A-29 and A-30):

> "The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. *E.g. Elder* v. *N. Y. Central R. R.*, 152 F. 2d 361, 364 (6th Cir. 1945), See Note 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist

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[7] *Fagan* v. *Penn. R. R. Co.*, 173 F. Supp. 465 (D. C. M. D. Penn., 1959); *McMullans* v. *Kansas Okla. & Gulf Ry. Co.*, 229 F. 2d 50 (C. A., 10th Cir., 1956); *Pellicer* v. *Brotherhood of Ry. & SS. Clerks, etc.*, 118 F. Supp. 254, (D. C. S. D. Fla., 1954) aff'd. 217 F. 2d 205, (C. A., 5th Cir., 1954) cert. denied 349 U. S. 912 (1955); *Goodin* v. *Clinchfield R. R. Co.*, 125 F. Supp. 441, 448, (D. C. E. D. Tenn., 1955) aff'd. 229 F. 2d 578 (C. A., 6th Cir., 1956); *Napier* v. *System Federation No. 91*, 127 F. Supp. 874 (D. C. W. D. Ken., 1955); *Walker* v. *Penn-Reading Seashore Lines*, 142 N. J. Eq. 588, 61 A. 2d 453 (N. J. 1948); *Lamon* v. *Ga. S. & Fla. Ry. Co.*, 212 Ga. 63, 90 S. E. 2d 658 (Ga., 1955) and see *Construction and Application of Seniority Provisions in Labor Relations Agreements*, 174 ALR 573 (1948).

beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

"The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective bargaining agreement. * * *

"The *closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable.* [emphasis added] As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely, unions are now fully of age and are able to protect themselves and their members at the bargaining table."

The conflict between the Second Circuit on the one hand and the Fifth, Sixth and Seventh Circuits on the other, should be resolved by this court in the fashioning of a substantive federal law in an important area of the federal labor law.

3.

The decision of the Court of Appeals has determined questions of widespread importance involving federal substantive law which have not been, but should be, settled by this court.

This Court has never passed on whether seniority rights and obligations should survive the termination of the collective bargaining agreement under which provision is made therefor, or should survive the termination of the employment relationship to which they apply. Compare, *Trailmobile* v. *Whirls*, 331 U. S. 40, 53, Note 21 (1946);

dissenting opinion by Mr. Justice Whittaker in *United Steel Workers* v. *Enterprise Corp.*, 363 U. S. 593, 601 (1960).

Under the provisions of the collective bargaining agreement relating to seniority Respondents and other former employees of petitioner at its Elmhurst plant had rights to be recalled to work only so long as the employer-employee relationship existed and only so long as the collective bargaining agreement existed. But here the relationship of employer-employee had been terminated and the collective bargaining agreement had been terminated pursuant to its terms. No rights had accrued to respondents and other former employees of petitioner during their employment or during the existence of the collective bargaining agreement to be recalled in the event work was available. The agreement which expired by its terms did not provide that respondents and other former employees continued to be afforded rights *in futuro* as though the employment relationship continued or as though the collective bargaining agreement continued.

Provisions similar, if not identical, to the provisions contained in the collective bargaining agreement here, are contained in practically all collective bargaining agreements in industry. The interpretation of these provisions by the Court of Appeals has far reaching consequences contrary to what has been known in the experience of management and labor with respect to such seniority rights, both factually and legally.[8]

In *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953) this court stated at page 333 that it granted certiorari

> "* * * because of the widespread use of contractual provisions comparable to those before us and because

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[8] See, *Oddie et al.* v. *Ross Gear and Tool Company Inc.*, U. S. D. C. E. D. Mich., S. D., Civ. No. 21350—July 5, 1961; The New York Times, Vol. CX, No. 37,784, page 30, col. 1, July 6, 1961.

of the general importance of the issue in relation to collective bargaining."

The novel interpretation by the Court of Appeals of petitioner's collective bargaining agreement with respondents' agent will have far-reaching repercussions in the field of labor-management relations. Moreover, the interpretation is contrary to judicial precedents which have been accepted by both management and labor for many years. Numerous collective bargaining agreements have been made and are being acted on in good faith in line with these precedents. The interpretation of the Court of Appeals may well lead to drastic upheaval in the labor relations field.

Plant modernization and relocation brought on by rapid economic and technological changes occur frequently in the present industrial growth of the country. It is of the utmost importance to settle the rights of employers, unions and employees involved in or committed to collective bargaining agreements which may now or hereafter contain similar provisions relating to seniority rights, and restricted to specific plants.

4.

Participation by a Court of Claims judge vitiates the judgment of the Court of Appeals.

The judgment of the Court of Appeals (Appendix A, p. A-31) was made upon an opinion written by Honorable J. Warren Madden, concurred in by Honorable Sterry R. Waterman, with a dissent by Honorable J. Edward Lumbard, Chief Judge.

Judge Madden had been designated to sit as a member of the United States Court of Appeals for the Second Circuit. He was at that time a member of the United States Court of Claims. He was sworn in as a judge of that court

on January 8, 1941 after appointment by the President of the United States with the concurrence of the Senate.

The United States Court of Claims is a legislative court and not a constitutional court. *Ex Parte Bakelite Corp'n,* 279 U. S. 438 (1929); *Williams* v. *U. S.,* 289 U. S. 553 (1933).

The Act of July 28, 1953, 67 Stat. 226, Title 28, USC §171 enacted some thirteen years after the appointment of Judge Madden by the President and the concurrence of the Senate, attempted unconstitutionally to repudiate the *Williams* classification that the Court of Claims was a legislative and not a constitutional court. Article III of the Constitution of the United States of America.

The judgment of the Court of Appeals therefore, stands with one judge of that court voting to reverse the judgment of the lower court dismissing the complaint, and one judge, the Chief Judge, dissenting and voting to affirm the dismissal of the complaint.

Judge Madden's participation in the hearing and determination of the appeal and the making of the judgment vitiated it.

This Court has never passed upon this question. *Lurk* v. *U. S.* (No. 669) decided by this Court May 29, 1961, with dissents by Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Stewart. 6 L. ed. 2d 845. (not officially reported.)

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated July 20, 1961.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment of the District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS AND MARCELLE KREISCHER, Plaintiffs, *against* THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a foreign corporation, Defendant.	Civil 135-16.

Appearances:

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WHITE & CASE, Esqs., Attorneys for Defendant, 14 Wall Street, New York 5, N. Y., CHESTER BORDEAU, Esq., of Counsel.

PALMIERI, J.

This case involves a dispute between a corporate employer and a group of employees concerning the seniority provisions of an expired collective bargaining agreement.[1]

[1] At the hearing on May 23, 1960, the parties stipulated in the record that each waived jury trial with respect to the issue of defendant's liability. It was further stipulated that if the court should determine that defendant is not liable to plaintiffs, the court would thereupon order dismissal of the complaint; and if the court should hold that defendant is liable to plaintiffs, a jury would be empanelled to determine the issue of damages.

Appendix A.

Plaintiffs, former employees of the defendant at its Elmhurst, New York plant, commenced this action in 1958 in the Supreme Court of the State of New York, County of New York, seeking to recover damages for defendant's alleged breach of its contract with General Warehousemen's Union, Local 852 of the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, a labor union of which the plaintiffs are members. Defendant is an Ohio corporation authorized to do business in New York; plaintiffs are New York residents.

On defendant's petition setting forth the diverse citizenship of the parties and the value of the matter in controversy, the action was removed to this court. 28 U. S. C. §§1332, 1441(a). Jurisdiction here is based solely upon diversity of citizenship. The union is not a party and the court's power to proceed under §301 of the Labor-Management Relations Act of 1947, 29 U. S. C. §185, has not been invoked. In urging their respective contentions, the parties have apparently assumed that the substantive law to be applied is that of New York. See *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 460 (1954). With respect to the legal issue raised by the complaint, however, the court has examined both New York law and the policy of our national labor laws, see *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), and has been unable to detect any differences which might bear upon the resolution of this controversy. See *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692 (7th Cir.), *cert. denied*, 361 U. S. 884 (1959).

STATEMENT OF FACTS[2].

From 1929 until November 30, 1957, defendant operated a plant at Elmhurst where it engaged, among other things,

[2] Pursuant to a stipulation between the parties, the defendant submitted a Statement of Facts in lieu of the taking of its deposition. At the hearing, plaintiffs' counsel introduced in evidence Exhibits annexed to defendant's Statement and read into the record

in the manufacture of coconut products, spices and condiments. Defendant and Local 852 first entered into a collective bargaining agreement on January 6, 1950, effective December 1, 1949, and expiring November 30, 1951. Thereafter, agreements were re-entered at two-year intervals. The last of these successive two-year agreements is dated March 13, 1956 and embraced the period from December 1, 1955 to November 30, 1957. By its terms, the agreement would be automatically renewed unless either party gave sixty days' notice of termination. Such notice was given by defendant on September 16, 1957 and the agreement was terminated on November 30, 1957.[3]

The defendant terminated the collective bargaining agreement pursuant to the decision of its Board of Directors to discontinue operations at the Elmhurst plant and to establish a new plant at Bethlehem, Pennsylvania. Defendant leased the Bethlehem plant on May 6, 1957 and, on May 16, 1957, Elmhurst employees were notified that operations would be discontinued in several months. In October, November and December of 1957, defendant removed some of the Elmhurst machinery and equipment for relocation at the Bethlehem plant.[4] Additional machinery and equip-

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considerable portions of the Statement itself. Plaintiffs offered no other evidence. Defendant then offered the remaining portions of the Statement and plaintiffs were given leave to indicate any parts claimed to be irrelevant or incompetent. The facts summarized herein have not been disputed by plaintiffs.

[3] All of the plaintiffs commenced employment at the Elmhurst plant prior to December 1, 1949, the effective date of the first collective bargaining agreement. Plaintiff Zacharczyk was laid off on November 18, 1957; the other plaintiffs were laid off on November 1, 1957.

[4] Approximately 75% of the machinery previously used by defendant in its coconut processing and packaging operations at its Elmhurst, Long Island, plant is presently being used by defendant in its coconut processing and packaging operations at its plant in Bethlehem, Pennsylvania.

Approximately 25% of the machinery previously used by defendant in its condiment grinding, filling and packaging operations (including spices) at its Elmhurst, Long Island, plant is presently

ment were installed at Bethlehem and changes in manufacturing procedures were effected for the purpose of increasing production.

Under the agreement which was terminated on November 30, 1957, Elmhurst employees were entitled to seniority rights and certain fringe benefits. Defendant did not offer the plaintiffs continued employment at its Bethlehem plant with retention of seniority rights acquired at Elmhurst; it did offer to receive applications at the Bethlehem plant from former Elmhurst employees and to give Elmhurst applicants fair consideration along with all other applicants. Defendant did not give Elmhurst employees the opportunity to submit at the Elmhurst plant applications for Bethlehem employment. None of the plaintiffs filed applications for positions at the Bethlehem plant.[5] However, applications were received from two former Elmhurst employees who are not parties to this action and offers of employment were made to both. One accepted and is currently employed at the Bethlehem plant. He has received no credit for seniority accrued while employed by defendant at its plant in Elmhurst.

The Alleged Breach of Contract.

On these agreed facts, plaintiffs have raised a narrow and sharply defined legal issue. It is conceded that the collective bargaining agreement governing employment relationships at the Elmhurst plant was terminated on November 30, 1957 and that, in effecting the termination of

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being used by defendant in its condiment grinding, filling and packaging operations (including spices) at its plant in Bethlehem, Pennsylvania.

[5] New employees hired at Bethlehem perform duties similar to those performed at Elmhurst by plaintiffs Zdanok (coconut filling), Kreischer (spice filling), and Hackett (spice filling). Duties performed by plaintiffs Zacharczyk and Williams (shipping) at Elmhurst have been incorporated into other job classifications at Bethlehem.

the agreement, the defendant fully complied with all statutory and contractual requirements. Nor do plaintiffs challenge defendant's right or impugn its good faith in closing the Elmhurst plant and establishing a new plant in Bethlehem. *Cf. United Steel Workers* v. *New Park Mining Co.*, 169 F. Supp. 107, 110-11 (D. Utah 1958). The sole issue raised by the complaint concerns the scope and significance of the seniority provisions of the collective bargaining agreement.[6]

Plaintiffs maintain that it was an implied condition of the bargain between the union and the company that the seniority rights created by the contract would survive the termination date of the agreement. It is urged that to meet the continuing obligations imposed by the surviving seniority provisions, defendant was required to offer plaintiffs employment at Bethlehem to which seniority status acquired at Elmhurst would attach. Plaintiffs claim that defendant's failure to make such an offer resulted in the deprivation, not only of their right to continued employment, but also of their interest in fringe benefits arising from defendant's pension[7] and group life insurance[8] plans and the union's welfare plan.[9]

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[6] Under the circumstances of this case, plaintiffs have standing as beneficiaries of the collective bargaining agreement to enforce provisions made for their benefit. *Local Lodge 2040* v. *Servel, Inc.*, 268 F. 2d 692, 696 (7th Cir.), *cert. denied*, 361 U. S. 884 (1959). 6 Corbin, Contracts §1420 n. 73 (1951, Supp. 1959).

[7] "Pursuant to the terms of the contract, the employees of the defendant at its plant in Elmhurst, New York were entitled to certain benefits under the defendant's Retirement Plan for Hourly Employees provided they complied with certain necessary conditions of the Plan. The Plan provides for benefits for employees retiring at 65 years of age. It further provides for retirement of employees after reaching 55 years of age while still employed by the defendant and having 15 years of credited service with the defendant. Also, an employee with 15 years of credited service with the defendant who is totally and permanently disabled at any time while employed by the defendant receives retirement benefits. Vested rights to retirement benefits at age 65 are acquired

Appendix A.

Defendant contends that no implied understanding as to the survival of seniority rights can reasonably be drawn from the terms of the agreement or the prior relationship of the parties. Rather, it is defendant's position that seniority ratings acquired at Elmhurst and the benefits secured by such ratings derived from and depended upon a

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after the employee reaches age 45 while still employed by the defendant and has 15 years of credited service with the defendant. The Plan is non-contributory and the defendant pays the entire cost of the benefits. The Plan covers regular hourly employees of the defendant employed at its various plants throughout the United States where the Plan is in effect. Upon termination of employment of the employees at the defendant's plant in Elmhurst, New York on November 30, 1957, those who were 65 years of age, or who had 15 years of credited service and were 55 years of age and who elected to receive retirement benefits early were eligible for and are presently receiving retirement benefits pursuant to the defendant's Retirement Plan for Hourly Employees. Those employees who were 45 years of age and had 15 years of credited service were advised by the defendant of their vested rights in the Plan to retirement benefits upon reaching 65 years of age. With the exception of the aforementioned employees, no other employees of the defendant's plant in Elmhurst, New York received any benefits under the defendant's Retirement Plan for Hourly Employees after employment was terminated at such plant." Transcript, pp. 7-8.

[8] "There is no reference in the contract to the defendant's Group Life Insurance Plan. However, on a voluntary basis, the defendant made its employees of its plant in Elmhurst, New York eligible under this plan for six consecutive months of employment. Pursuant to the terms of the plan, the life insurance coverage for each employee was continued for 31 days after the employee's termination of employment." Transcript, p. 10.

[9] "Pursuant to the terms of the contract the defendant was required to pay 4½¢ an hour per employee or a maximum of $1.80 per employee per week into the Union Welfare Fund during the term of the aforementioned contract.

"This requirement was amended December 1, 1956 so that the defendant was required to pay 8.55¢ per hour per employee or a maximum of $3.42 per employee per week for the remainder of the term of the contract. The defendant had no control or responsibility for the administration of the Union Welfare Plan other than to make the aforementioned payments." Transcript, p. 9.

contract expressly confined in scope and application to terms and conditions of employment at the plant in Elmhurst. Accordingly, defendant asserts that upon cessation of operations and lawful termination of the agreement, the subject of plaintiffs' seniority rights, *i.e.*, employment at Elmhurst, ceased to exist. In short, defendant maintains that the contracting parties never bargained for transferable seniority rights and that the implication that such rights were designed to outlive the life of the plant and the agreement is without foundation.

The Prior Proceedings and The Defense of Res Judicata.

On October 23, 1957, Local 852 served on defendant a notice of intention to arbitrate certain disputes pursuant to section 1458(a) of the New York Civil Practice Act and the terms of the collective bargaining agreement. The defendant then moved in the Supreme Court of New York, Queens County, to stay arbitration upon the ground that the disputes were not arbitrable under the arbitration clause of the collective bargaining agreement. That clause provides as follows:

> "Any question, grievance or dispute arising out of and involving the interpretation and application of the specific terms of this Agreement . . . shall, at the request of either party, be referred to the New York State Mediation Board for arbitration."

The court granted defendant's motion, holding that the issues tendered for arbitration did not "arise out of the specific terms" of the collective bargaining agreement. In an opinion filed in support of its order staying arbitration,[10] the court stated:

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[10] *Matter of General Warehousemen's Union*, 10 Misc. 2d 700, 172 N. Y. S. 2d 678 (1958).

> "[N]o provision was made in the collective bargaining agreement relating to the continuance or discontinuance of operations at Elmhurst; for the continuance of employment of employees covered by the said agreement for any period of time other than the expiration date thereof, nor requiring the company to offer to each employee continued employment with full seniority in the event of discontinuance. It cannot, therefore, be said that the disputes the Union claims to have with Glidden are referable to arbitration under a clause which requires arbitration only with respect to '*specific terms*' of a collective bargaining agreement."
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> . . . .
>
> "It follows . . . that Glidden's motion to stay arbitration must be granted, whatever other remedies the union may have with respect to the alleged disputes." (10 Misc. 2d 700 at 705-6, 172 N. Y. S. 2d at 683-84).

Following this decision the plaintiffs instituted the present action. Before interposing its answer, defendant moved for summary judgment urging that the doctrine of *res judicata* required dismissal of the plaintiffs' claim. In a memorandum order, Judge Dimock denied the defendant's motion.[11] Defendant then filed its answer, affirmatively alleging the defense of *res judicata*.

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[11] The memorandum reads as follows:

"Defendant moves for summary judgment on the ground that a state court has held that plaintiffs' claim is without substance and that it should therefore be dismissed as *res judicata*. I do not agree that the claim has been held to be without substance. I read the state court opinion as holding only that the claim is not within the arbitration agreement there sought to be enforced. My construction of the state court ruling is enforced by the statement at the end of the judge's opinion, Mtr. of Gen. Warehousemen's Union, 10 Misc. 2d 701, 706, '. . . motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.' " (S. D. N. Y. September 22, 1958).

Appendix A.

The question of fact litigated and determined by the state court and essential to its order staying arbitration was whether or not the claims as to survival of seniority rights arose out of the specific terms of the agreement. The state court found that none of the specific contractual provisions expressly conferred the rights now asserted by plaintiffs.[12] As to this issue, the state court judgment should have a collateral estoppel effect[13] precluding plaintiffs from relitigating the question whether their claims arise out of the specific language of the contract. However, defendant is entitled to no further benefit by reason of the prior adjudication.[14] To determine whether the union's claims were arbitrable, the state court was not required to reach the issue presented here. For plaintiffs now urge that when the ambiguities and gaps in the contract are studied in the context of the long-term employment relationship existing between the parties, the survival of seniority rights emerges as an implied part of the bargain.[15] In other words, the plaintiffs seek application of the agree-

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[12] "In the case at bar the Union has not been able to point to any specific term or provision in the collective bargaining agreement in question or by reference to the welfare, pension and group insurance plans which are part of this record, requiring Glidden to continue operations at Elmhurst or to continue the employment of any employee for any period of time, certainly not beyond the expiration date of the agreement, or to offer to each employee employment with full seniority after the discontinuance of such operations, or as an alternative severance pay, or in any way dealing with alleged property rights for employees whose employment has been terminated by Glidden's discontinuance in good faith of its operations at Elmhurst." (10 Misc. 2d at 704, 172 N. Y. S. 2d at 682).

[13] See Restatement, Judgments §§45(c), 65(2), 68, 80(4) (1942). See also *Schuylkill Fuel Corp.* v. *B & C Nieberg Realty Corp.*, 250 N. Y. 304, 165 N. E. 456 (1929).

[14] See Restatement, Judgments, *supra* §68(2); *Karameras* v. *Luther*, 279 N. Y. 87, 17 N. E. 2d 779 (1938).

[15] *Cf. Groseclose* v. *Great Northern Ry.*, 25 F. R. D. 181 (D. Mont. 1960). See generally, Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1490-98 (1959).

ment, in a manner alleged to be consistent with the intent of the parties, to a situation for which no specific provision was made.[16]

THE SCOPE OF THE BARGAIN.

Under the seniority system in effect at Elmhurst,[17] employees were to be laid off in reverse order of plant seniority and recalled in inverse order of layoff. In instances of continuous layoff, the seniority of an employee with less than five years' employment was to terminate after two years' continuous layoff; for employees with more than five years' service, seniority was to be terminated at the end of three years.[18] If seniority had been terminated by reason of continuous layoff, a former employee would still be entitled to preference before new employees were hired.[19] Plaintiffs point out that their employment was terminated by defendant shortly before the expiration date of the contract.[20] Therefore, they assert that their rights to three-year retention of seniority and indefinite preferential rehiring had accrued while the contract was fully effective. In other words, plaintiffs view the termination of their employment as a layoff due to curtailment of production and claim that their accrued three-year seniority

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[16] *Cf. Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156, 167-78 (1959).

[17] See Exhibit A (Dec. 1, 1955-Nov. 30, 1957 Collective Bargaining Agreement), Article XI.

[18] The plaintiffs herein had been employed by the defendant at its Elmhurst plant for periods ranging between ten and twenty-five years.

[19] The seniority system outlined in the text had been in effect continuously since December 1, 1949, the effective date of the first collective bargaining agreement between the Glidden Company and Local 852.

[20] See note 3, *supra*.

retention rights entitled them to resume work when operations commenced in Bethlehem.[21]

Whether the agreement should be understood to assure to plaintiffs retained seniority rights had operations continued at Elmhurst after the collective bargaining agreement expired would present a troublesome question of construction. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, ... U. S. ..... (June 20, 1960). However, it is unnecessary to determine whether plaintiffs are correct in asserting that the expired agreement continued to afford recall rights to employees or whether, as defendant urges, all recall rights terminated when the period of the agreement came to an end.[22] For the critical issue is not whether plaintiffs' seniority retention rights accrued during the effective period of the collective bargaining

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[21] Plaintiffs concede that seniority rights created by a collective bargaining contract are not indestructible. See *Elder* v. *New York Cent. R. R.*, 152 F. 2d 361 (6th Cir. 1945). However, they urge that on the facts presented here plaintiffs' status could not be destroyed unless Local 852 and the Glidden Company agreed to a modification of employee seniority rights.

[22] The cases upon which plaintiffs rely relating to the survival of rights to vacation and severance pay are inapposite. In those cases the full consideration for the employer's obligation had been furnished by the employees. Although termination of employment followed termination of the contract, the obligation to pay related to services already performed at the plant covered by the agreement. *Matter of Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't 1955), *affirmed*, 2 N. Y. 2d 553, 161 N. Y. S. 2d 609 (1957), *cert. denied*, 355 U. S. 883 (1957), *arbitration reported sub nom. Brooklyn Eagle, Inc.*, 32 Lab. Arb. 156 (1959); *Owens* v. *Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442 (1956). In view of the apparent purpose of such vacation and severance pay provisions, it would be unreasonable to suppose that the parties did not expect their rights and obligations to be determined by reference to their prior understanding and practice. By contrast, the plaintiffs here seek damages for violation of their alleged right to transfer and continue an employment relationship involving future performance obligations on both sides.

agreement and survived its termination,[23] but whether the unit to which their rights could attach extended beyond the Elmhurst plant.[24] It is not enough for plaintiffs to establish that if Elmhurst operations had continued, their seniority status would have survived termination of the collective bargaining agreement. In order to recover, plaintiffs must also show the governing seniority system gave them the right to "follow their work" to the new plant.

I find nothing in the record to warrant the conclusion urged by plaintiffs as to the unlimited geographic scope of their seniority rights. Wide variations exist in seniority systems used in industry. See *Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U. S. 521, 526-27 (1949). With respect to the unit covered, an entire multi-plant company or district may be made subject to the same system, or the system may be limited to a particular plant, department or occupation.[25] Under the circumstances presented here—

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[23] See *Owens* v. *Press Publishing Co., supra,* note 22 (discharge from service during term of a contract is not a condition *sine qua non* to the enforcement of an accrued right).

[24] Plaintiffs' emphasis on the controlling significance of the technical accrual dates of their seniority rights is somewhat anomalous in view of the broad non-technical interpretation they urge with respect to the extent of the seniority unit. See Transcript, pp. 45, 51-54.

Under the circumstances presented here, it is altogether likely that the two and three year recall provisions were inserted to protect the plant seniority status of laid off employees should the agreement be automatically renewed from year to year beyond the specified expiration date. See Exhibit A, Article XXII. In the event of such automatic continuation of the agreement, accrued plant recall rights of employees who were laid off at the time renewal occurred would remain in full effect.

[25] The following units, among others, have been designated in collective bargaining agreements as the area within which employees may exercise seniority rights:

"*Companywide Seniority.*—Length of the service computed from the date of hiring into the company. All employees, regardless of plant location, ranked on the same seniority list.

the situation of the contracting parties,[26] their description of the subject of their agreement[27] and the absence of any prior history as to transferred seniority rights[28]—I have concluded that the parties' bargain and understanding was limited to seniority rights at the Elmhurst plant.

"*Plant Seniority.*—The length of time an employee has worked in the plant. All employees of the plant ranked on the same seniority list.

"*Department Seniority.*—The length of time an employee has worked in a particular department.

"*Job Seniority.*—The length of time an employee has worked on a particular job or in a particular job classification."

See Collective Bargaining Clauses: Layoff, Recall, and Work Sharing Procedures, U. S. Dept. of Labor, Bull. 1189, p. 42 (1956).

[26] At the hearing, plaintiffs' counsel conceded that even if all the 160-odd employees at the Elmhurst plant had accepted employment at Bethlehem, Local 852 could not continue as accredited bargaining representative. Transcript, p. 53.

[27] The agreement is entitled: "AGREEMENT between DURKEE FAMOUS FOODS, Division of The Glidden Company, No. 23—Elmhurst, New York, and GENERAL WAREHOUSEMEN'S UNION, LOCAL 852 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, December 1, 1955 to November 30, 1957."

Its preamble reads: "THIS AGREEMENT MADE AND ENTERED INTO AT NEW YORK, NEW YORK, by and between THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York, hereinafter referred to as 'the Company', and GENERAL WAREHOUSEMEN'S UNION, LOCAL 852 affiliated with THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, hereinafter referred to as 'the Union'."

[28] In the latter part of 1956 the defendant discontinued preparation at Elmhurst of shortening, confectionery products, and various oil products. These operations are now conducted at the defendant's plant in Louisville, Kentucky. The record contains no evidence of any proceedings between Local 852 and the Glidden Company with respect to this matter.

Cf. Groseclose v. *Great Northern Ry.*, 25 F. R. D. 181 (D. Mont. 1960); *Wilson* v. *Illinois Central R.R.*, 21 F. R. D. 588, 589 (N. D. Ill. 1957). See generally Cox and Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1116-33 (1950).

Appendix A.

The agreement between Glidden and Local 852 refers to plant and department seniority but no reference is made to extension of the unit contingent upon events such as plant abandonment, transfer, merger or consolidation of operations.[29] However, agreements containing provisions for extension of the area in which seniority rights may be exercised are not uncommon. Since such provisions are tailored to meet the needs of particular enterprises, they vary considerably in form and content. For example, they may be limited to a specific time period, to new plants only, or to employees laid off as a result of total plant closing.[30] In view of the alternative techniques which might be employed to deal with the issue of interplant seniority,[31]

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[29] See Exhibit A, Article XI.

[30] See Analysis of Layoff, Recall and Work-Sharing Procedures in Union Contracts, U. S. Dept. of Labor, Bull. 1209, pp. 25-34 (1957).

[31] Techniques which have been used to deal with interplant transfer situations are illustrated by the following clauses:

"*Multiplant company agreement: Employees laid off given preference in employment over applicants at other company plants*

"Employees laid off in any plant through reduction of force, desiring employment in other plants of the company, may make application at such other plants in the regular manner and will receive preference for any vacancy they may be qualified to fill before new employees are hired." Bull. 1189, *supra* note 22 at p. 33.

"When operations or departments are transferred from one plant to another plant of the corporation, employees engaged on such operations or employed in such departments who are out of work as a result of the transfer may if they so desire be transferred to the other plant and carry their ranking for seniority to the other plant." Collective Bargaining Provisions: Seniority, U. S. Dept. of Labor, Bull. 908-11, pp. 47-48 (1949).

"*Accumulated Seniority Transferred with Employee to Another Plant in Event of Geographical Relocation*

it would be unreasonable to expect a court to imply a general understanding between the parties as to the extent of the seniority unit when no evidence has been offered as to

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"In the event of the geographical relocation in whole or in part of any of the work performed by any of the employees covered by this agreement, the employee affected, after due consideration for the seniority rights of the employees at the new location, may be transferred at company expense to the new location and given full credit for their accumulated classification seniority at the point to which the work is transferred in whole or in part." Bull. 908-11, *supra,* p. 49.

"*Company-Wide Seniority*

"Seniority of employees shall be company-wide and such seniority shall commence from original date of employment in the production and maintenance departments of the company's operations for employees certified in the order issued by the National Labor Relations Board." Bull. 908-11, *supra,* pp. 15-16.

"*State-Wide Seniority*

"For the purpose of applying the seniority provisions of this article the State of ..... shall be regarded as the unit." Bull. 908-11, *supra,* p. 16.

"*Seniority by Geographical District; Modifications by Mutual Agreement*

"The operations of the company shall be divided into the following five (5) seniority districts in which operators there regularly employed shall hold seniority.

District 1 ..... • • • Regions
District 2 ..... • • • Regions
District 3 ..... • • • Regions
District 4 ..... • • • Regions
District 5 ..... • • • Regions

"If any change occurs in the operations of the company which would necessitate an increase in, decrease from, or rearrangement of the above named seniority districts the company agrees that said increase, decrease, or rearrangement shall be subject, as same affects seniority, of further negotiations and agreement between the parties hereto." Bull. 908-11, *supra,* p. 16.

negotiations on the subject or an established course of practice on the part of the employer.

Contrary to plaintiffs' contention, the collective bargaining agreement does not become illusory if its provisions are held to relate to a single existing plant. This is not the case of an employer who has abandoned the specified plant and transferred operations to a new location in order to circumvent contractural or statutory requirements.[32] Where, as here, the Board of Directors' decision to relocate is based on an exercise of business judgment in good faith, the employer's obligation to deal fairly and honestly with its employees is satisfied.[33] In sum, under the circumstances presented in this case, where no relevant limitation on the employer's freedom of action is found in the agreement or the prior conduct of the parties, no policy of New York law or our national labor law requires the employer to preserve for its employees seniority status acquired under an expired agreement covering a closed plant.[34]

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[32] *Cf. Matter of Jacob H. Klotz,* 13 N. L. R. B. 746 (1939) (employer acted in bad faith in transferring operations to a new location).

[33] In urging that they have been deprived of rights under the Retirement Plan, Group Life Insurance Plan, and Union Welfare Plan, see notes 7-9, *supra,* plaintiffs do not rely upon any provision contained in special agreements setting up the plans. Rather, they assert that they have been deprived of rights under each of the plans by reason of defendant's alleged breach of the seniority provisions of the collective bargaining agreement.

[34] See *Local Lodge 2040* v. *Servel, Inc.,* 268 F. 2d 692, 698 (7th Cir.), *cert. denied,* 361 U. S. 884 (1959); *System Federation No. 59* v. *Louisiana & A. Ry.,* 119 F. 2d 509 (5th Cir. 1941); Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1497 (1959); Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 401 (1950).

Conclusion.

Accordingly, it is my conclusion that plaintiffs have failed to prove facts which would entitle them to the relief sought. The Clerk is directed to enter judgment on the merits and costs against the plaintiffs. Fed. R. Civ. P. 52(a).

So Ordered.

Dated: New York, N. Y.
June 30, 1960.

/s/ Edmund L. Palmieri
Edmund L. Palmieri
U. S. D. J.

Judgment Entered 6/30/60

Herbert A. Charlson
Clerk

Appendix A.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 217—October Term, 1960.

(Argued February 8, 1961 Decided March 28, 1961.)

Docket No., 26542

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Plaintiffs-Appellants,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Defendant-Appellee.

Before:

LUMBARD, Chief Judge,

MADDEN, Judge, United States Court of Claims,* and WATERMAN, Circuit Judge.

Action by former employees for damages for breach of collective bargaining agreement. The United States District Court for the Southern District of New York, Edmund L. Palmieri, J., held that plaintiffs had no rights to preserve seniority status under the expired collective agreement. 185 F. Supp. 441. Plaintiffs appealed. The Court of

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* Sitting by designation.

Appeals, MADDEN, Judge, United States Court of Claims, held that a state court's decision refusing to compel arbitration was not *res judicata* of plaintiffs' claims, that plaintiffs were entitled individually to enforce their seniority rights under the collective agreement, and that plaintiffs' rights under the agreement were violated when their employer deprived them of continued employment with accrued seniority at the employer's new plant location.

Reversed.

MORRIS SHAPIRO, New York, N. Y. (HARRY KATZ, SAHN, SHAPIRO & EPSTEIN, New York, N. Y., on the brief), for plaintiffs-appellants.

CHESTER BORDEAU, New York, N. Y. (CHARLES C. HUMPSTONE, WHITE & CASE, New York, N. Y., on the brief), for defendant-appellee.

MADDEN, Judge:

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

Each agreement contained a provision establishing a system of seniority which required that in case of a curtail-

ment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority would entitle him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions. The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957 the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957. After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

Appendix A.

There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come to Bethlehem and make application there on the same basis as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of *res judicata*. That defense was considered and rejected, first by Judge Dimock, on a motion by the

defendant for summary judgment and again, after the defendant had filed its answer asserting *res judicata* as an affirmative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union, served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

> Any question, grievance or dispute arising out of and involving the interpretation and application *of the specific terms* of this Agreement * * * shall, at the request of either party, be referred to the New York State Mediation Board for arbitration. (Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitrated were not covered by *the specific terms* of the contract. The court's opinion[1] lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

> It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes.

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as nar-

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[1] *Matter of General Warehousemen's Union,* 10 Misc. 2d, 700, 172 N. Y. S. 2d 678 (1958).

rowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargaining agreements contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon *Parker* v. *Borock,* 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959), as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the *Parker* case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N. Y. 2d at p. 160, 156 N. E. 2d at p. 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and lim-

ited to the provisions of the agreement," had "entrusted his rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N. Y. 2d at p. 161, 156 N. E. 2d at pp. 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfill its duties under the agreement.

The *Parker* case is, therefore, significantly different from the instant case. In *Parker,* the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process. That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case, as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.[2] The plaintiffs have not, therefore, entrusted to their union representative the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

> Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists.

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geo-

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[2] *Matter of General Warehousemen's Union, supra.*

graphical shift of the plaintiff's factory operations. We discuss that problem later herein.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that he has earned, and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for re-employment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." *Parker* v. *Borock,* 5 N. Y. 2d 156, 156 N. E. 2d 297-298, citing *Barth* v. *Addie Co.,* 271 N. Y. 31, 2 N. E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15

years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court, found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extend beyond the Elmhurst plant." He held that the rights were not enforceable except in the Elmhurst plant, and therefore denied recovery. With deference, we disagree with this conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

> for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York.

If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93d Street in Elmhurst, an entire structure of valuable legal rights would tumble down. *A fortiori* if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat.* If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instance case the plant was, of course, not moved from 94th Street to 93d Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer, would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract.

The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in connection with the welfare plan and the group insurance plan which were included in the union agreement.

It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LUMBARD, Chief Judge (Dissenting):

For the reasons persuasively set forth in Judge Palmieri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957), did not *sub silentio* overrule the distinction between "individual" and "union" rights announced in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Co.,* 348 U. S. 437, 461 (1955). Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, *Local Lodge 2040* v. *Servel, Inc.,* 268 F. 2d 692, 696 (7th Cir.), *cert. den.* 361 U. S. 884 (1959), the contract should be construed in light of federal substantive law pursuant to §301 of the Labor Management Relations Act, 29 U. S. C. §185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract.

E.g., *Elder* v. *New York Central R.R.*, 152 F. 2d 361, 364 (6th Cir. 1945); see Note, 54 Nw. U. L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargaining agreement; whether such rights continue depends on the terms of the contract. See *Metal Polishers Local 44* v. *Viking Equipment Co.*, 278 F. 2d 142 (3d Cir. 1960). The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

Appendix A.

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,

Hon. J. WARREN MADDEN,
Judge, Court of Claims,

Hon. STERRY R. WATERMAN,

Circuit Judges.

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Plaintiffs-Appellants,

v.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, A FOREIGN CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX B.

Constitution of the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * * * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Appendix B.

Title 28 U. S. C.

§171. Appointment and Number of Judges; Character of Court

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States. As amended July 28, 1953, c. 253, §1, 67 Stat. 226; Sept. 3, 1954, c. 1263, §39(a), 68 Stat. 1240.

Title 29 U. S. C.

§157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, §101, 61 Stat. 140.

§158. Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

§185. Suits By and Against Labor Organizations—Venue, Amount, and Citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

No. 242

IN THE

Supreme Court of the United States

October Term, 1960

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a foreign corporation,
Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PENNSYLVANIA STATE CHAMBER OF COMMERCE AS *AMICUS CURIAE*

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BATAVIA TIMES - LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS

Table of Cases.

Other Authorities.

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BRIEF OF PENNSYLVANIA STATE CHAMBER OF COMMERCE AS *AMICUS CURIAE*

By consent of the petitioner and the respondents, indorsed on Consent to Filing of Amicus Curiae Brief, submitted herewith, Pennsylvania State Chamber of Commerce files this brief as *amicus curiae.*

Interest of the *Amicus Curiae*

The *amicus curiae,* Pennsylvania State Chamber of Commerce, (hereinafter sometimes called the "Chamber") has an interest in the instant case in that it is an association representing more than four thousand manufacturers, businessmen and employers who are engaged in all phases of industry and commerce in all areas of the Commonwealth of Pennsylvania. One of the paramount responsibilities of the Chamber is to advise employer-members of current developments in labor relations and to aid them in formulating policies in matters concerning collective bargaining. Many of the members of Chamber are currently parties to collective bargaining agreements which contain seniority provisions identical or similar to those which are involved in the instant case.

In addition to playing an important role in influencing the business climate of the Commonwealth of Pennsylvania, a matter of great and continuing importance to the Chamber, the interpretation ultimately to be given to the basic seniority provisions now before the Court for construction will have a vital and widespread effect on the formulation of future policies in matters concerning collective bargaining by the Chamber and its members and in the manner in which employer-members of the Chamber will conduct themselves during the lives of current labor contracts which contain identical or similar provisions to those present here.

Questions Presented

(a) If in good faith an employer which operates several plants in widely separated areas of the country closes one plant and terminates the employment of the employees who

were employed at the closed plant simultaneously with the expiration of the existing collective bargaining agreement between the employer and the collective bargaining agent of said discharged employees, are the rights arising from the seniority provisions of said expired agreement transferable to and enforceable at the other plants of the employer in the absence of any language in the expired agreement that such rights should be so transferable and enforceable and notwithstanding the fact that the employees at the other plants have selected different collective bargaining agents to represent them?

(b) Do seniority rights under a collective bargaining agreement between an employer and the collective bargaining agent of its employees survive the expiration of said agreement and the termination of the employment relationship of said parties?

Reasons for Allowance of the Writ

The Honorable Court is respectfully urged to allow a writ of certiorari in the instant case for the following reasons:

1. The instant decision of the Court of Appeals has by a split decision determined questions of widespread importance potentially involving every employer, collective bargaining agent and employee who are currently parties to a collective bargaining agreement containing seniority provisions similar or identical to those here involved and has thereby fashioned important federal substantive law to be followed and applied in the enforcement and interpretation of fundamental and basic concepts of seniority which has not been, but should be, settled by this Court.

2. The instant decision of the Court of Appeals is in conflict with the decisions of the United States Courts of

Appeals for the Fifth, Sixth and Seventh Circuits, in that it holds that in the absence of any express language manifesting such an intention, seniority rights survive the termination of the employment relationship and the expiration of the collective bargaining agreement from which they stemmed and are transferable to and enforceable at other plants of the employer notwithstanding the fact that the employees of the other plants have selected different collective bargaining agents and are parties to different collective bargaining agreements.

ARGUMENT IN SUPPORT OF REASONS

1. The instant decision of the Court of Appeals has by a split decision determined questions of widespread importance and has thereby fashioned important federal substantive law to be followed and applied in the enforcement and interpretation of fundamental and basic concepts of seniority which has not been, but should be, settled by this Court.

A vast proportion of current collective bargaining agreements contain seniority provisions. As noted by the authors of the *1961 Guidebook to Labor Relations*, Commerce Clearing House Inc., at page 62, Par. 307:

> "One of the oldest of union objectives, seniority provisions are part of virtually every union contract * * *".

It may also be noted that an overwhelming number of such seniority clauses include preferential recall provisions which more or less follow the conceptual scheme present in the collective bargaining agreement now before the Court.

As noted above, seniority provisions are among the oldest of union objectives and do not represent a newly con-

ceived development in labor relations. As a review of the intricacy of the provisions here involved will indicate, such clauses presently possess maturity, complexity and comprehensiveness which are the end product of repeated examination of both the substantive content and language which takes place each time the parties sit down to renegotiate their contract. While many provisions of current collective bargaining agreements may lack verbal completeness and require Courts to undertake a search for implied conditions in order to properly understand the parties' intentions, seniority clauses, as they have developed, leave very little to be determined by implication. The implied conditions which may have once attended the seniority clauses have long since been reduced to writing. In this connection, however, it must be noted that much reliance has been placed on the existence of such implied conditions in the instant opinion. This Court has never passed on the question of whether seniority rights and obligations survive the termination of a collective bargaining agreement or the employment relationship. If such rights and obligations are controlled by the existence of implied conditions, it is essential that it be made clear to parties to collective bargaining agreements that such results will follow even though the contract is silent on the subject.

It is against the almost universal existence of seniority clauses that the impact of the technological revolution which is now taking place in the industrial world must be reflected if a measure of the instant case's importance is to be understood.

The frequency with which employers find it necessary to modernize, relocate and redesign their production facilities is great and increasing daily. It is of the utmost importance